

ESSAY

Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board

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In this Essay, the senior member of the National Labor Relations Board reflects on the aging of American labor law and the agency that administers it. In her view, the National Labor Relations Act, which has not been updated in 60 years, is now out of sync with a transformed economy. Meanwhile, the Board, even accounting for the statutory, judicial and political constraints under which it operates, has failed in its duty to apply the statute dynamically. The author suggests, however, that the stakes are too high to abandon hope for a revitalization of labor law and policy.

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The views expressed in this article are mine alone and do not reflect the views of any other Board Member or the NLRB.

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I. INTRODUCTION

Today, more than seventy years after passage of a law intended to encourage collective bargaining and equalize bargaining power between labor and capital, there is rapidly rising income inequality,¹ and organized labor, as a percentage of the private sector workforce, is at a historic low point.²

Various commentators describe the National Labor Relations Act,³ enacted in 1935 (the Wagner Act), and “essentially unchanged since 1947”⁴ (the Taft-Hartley Act amendments),⁵ as dead, dying, or at least “largely irrelevant to the contemporary workplace”—a doomed legal dinosaur.⁶ In their view, the Act has failed to protect workers’ rights to organize and to promote the institution of collective bargaining. Scholars contend that labor law suffers from “ossification.”⁷ Some even say that it is “contributing to the demise of the very rights it was enacted to protect.”⁸ Collective action seems “moribund.”⁹ Supporters of the Act are “in despair.”¹⁰ The National

1. Analysis of Internal Revenue Service data reveals that the earnings gap is now the widest since 1928, with the richest 1% of Americans having captured most of the economy’s 2005 growth, and the bottom 90% getting nothing. David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007. See also Greg Ip, *The Gap in Wages is Growing Again for U.S. Workers*, WALL ST. J., Jan. 23, 2004 (describing the declining power of unions as a factor in widening income disparities).

2. Union membership has declined from about 35 percent of the private sector workforce in the mid-1950s to less than 8 percent today. Steven Greenhouse, *Labor Seeks Boost From Pro-Union Measure*, N.Y. TIMES, Feb. 23, 2007, at A1; Press Release, Bureau of Labor Statistics, *Union Members in 2006* (Jan. 25, 2007), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

3. 29 U.S.C. §§151-169 (2000).

4. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 942 (1996) [hereinafter Brudney, *A Famous Victory*].

5. 29 U.S.C. §§ 141-187 (2000).

6. Brudney, *A Famous Victory*, *supra* note 4, at 942. See Cynthia Estlund, *The Death of Labor Law?* NYU Law School, Public Law Research Paper No. 06-16, 2 Ann. Rev. of L. & Social Science (Dec. 2006). For a management lawyer’s perspective, see Harry Sangerman, NLRB: DOA?, 33 EMPLOYEE RELATIONS L. J. 74 (2007). See also Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POLICY R. 375 (2007), for the view that the dysfunction of the system of labor law has given rise to innovation.

7. In writing about labor law’s “ossification,” New York University Law School Professor Cynthia Estlund observed, “I know of no other major American legal regime—no other body of federal law that governs a whole domain of social life—that has been so insulated from significant change for so long.” Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). See also James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572 (1996) [hereinafter Brudney, *Reflections*] (“Without expressly saying so, Congress has declined to make a continuing commitment to group action as a means of regulating the workplace.”).

8. Brudney, *A Famous Victory*, *supra* note 4, at 942. See also Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 938, 943-45 (2007).

9. Brudney, *Reflections*, *supra* note 7, at 1563.

10. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59 (1993).

Labor Relations Board, charged with administering the Act, is “isolated and politicized.”¹¹ “What went wrong?” and “Can we fix it?” are the questions of the day.¹²

Meanwhile, the Board’s case intake has plummeted.¹³ Increasingly disillusioned with the law’s ability to protect worker rights, labor unions have turned away from the Board, and especially from its representation procedures.¹⁴ This disenchantment has intensified in recent years as the Board, in case after case, has narrowed the statute’s coverage, cut back on its protections, and adopted an increasingly formalistic approach to interpreting the law.¹⁵ More and more, unions are seeking to negotiate recognition in the workplace rather than use the Board’s election machinery.¹⁶ And, in a historical twist, organized labor has turned increasingly to state and local governments for help in protecting workers,¹⁷ with diminished hope that the federal government can be a guarantor of important rights.¹⁸ Whether labor is right or wrong about the Board makes

11. James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221 (2005) [hereinafter Brudney, *Isolated*].

12. Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, B.C. L. REV. 125 (2003).

13. The Board’s representation case intake has declined by 26% from 2005 to 2006. From 1997 to 2007, it declined by 41%. During that same ten-year period, unfair labor practice case intake declined by 31%. BNA DAILY LABOR REPORT, *Board Inventory Lowest in Decades*, Jan. 17, 2007, at S9.

14. UNITE HERE President Bruce Raynor recently stated that the “government labor relations environment” has become “dysfunctional,” forcing unions to decide “whether they want the NLRB structure to continue.” *NLRB in Decline, Distrusted, Board Member, Union Leader, Say*, BNA DAILY LABOR REPORT, Jun. 4, 2007, at C1.

15. See *infra* notes 74-130 and accompanying text.

16. See, e.g., David Wessel, *Capital: Some Workers Gain With New Union Tactics*, WALL ST. J., Jan. 31, 2002; James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005); Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201 (2000) (criticizing the increased use of recognition agreements in union organizing).

17. See, e.g., Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, LERA Meetings, Jan. 2006 (forthcoming as *The Promise of Progressive Federalism*, in MAKING THE POLITICS OF POVERTY AND INEQUALITY (Jacob Hacker, Suzanne Mettler & Joseph Soss eds., 2007)); available at <http://www.press.uillinois.edu/journals/irra/proceedings2006/freeman.html>; Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 404-08 (2001) (discussing the prevalence of union neutrality agreements with state and local entities); Chamber of Commerce v. Lockyer, 463 F.3d 1076 (9th Cir. 2006) (en banc), cert. pending (finding a California law, which forbade employers receiving state funds from using those funds on union-related speech, was not preempted by the NLRA); Healthcare Ass’n v. Pataki, 471 F.3d 87 (2nd Cir. 2006), petition for en banc rehearing en banc pending (challenging a New York State law that forbade employers receiving state funds from using those funds to encourage or discourage union organization).

18. BNA DAILY LABOR REPORT, *supra* note 14, at C1. In 2002, then-HERE President John Wilhelm had this to say about the NLRB election system: “We have concluded that the system is simply broken and won’t be fixed until there’s a realization in Congress that workers don’t have the right to organize under the present system.” David Wessel, *Some Workers Gain with New Union Tactics*, WALL ST. J., Jan. 31, 2002.

little difference. In this case, the perception of the law's failure is what matters.

Something has indeed gone wrong. Somewhere along the way, New Deal optimism has yielded to raw deal cynicism about the law's ability to deliver on its promise. The National Labor Relations Act, by virtually all measures, is in decline if not dead. Nor, at least until recently, has there been any real prospect for labor law reform.¹⁹

In this context, what remains of the Act's original promise to achieve "economic advance and common justice"?²⁰ Is the NLRB destined to operate on the legal margins of a failed statute? Certainly, the Board operates under significant constraints: a judicial, political, and economic climate indifferent or even hostile to collective bargaining; an arguably antique statute; and a lack of administrative will. Yet I would suggest that the Board, even under the current statutory scheme, can play a modest but meaningful role in preserving the values of this Act and in furthering its aims. Its failure to do even that is an unfortunate lost opportunity.

In this Essay, I will sketch the historical arc of the Act's decline, describe the factors that constrain the Board in seeking to keep the Act relevant in the contemporary workplace, and examine the Board's own recent tendency to accelerate the downward trend. There are reasons enough for disenchantment with labor law, I readily acknowledge, but there are also grounds to reject despair.

II.

HOW TIME TARNISHED THE ACT

Unquestionably, the National Labor Relations Act generated enormous optimism about its promise of economic justice through collective action.²¹ It was a centerpiece of President Franklin Roosevelt's Second New Deal, which focused on reviving the Great Depression economy through regulation of business.²² Over the next twenty-five years, millions of

19. See generally Employee Free Choice Act, H.R. 800, 110th Cong. (2007); Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers (RESPECT) Act, H.R. 1644, 110th Cong. (2007).

20. 79 CONG. REC. 10720 (1935) (statement of President Franklin D. Roosevelt upon signing the National Labor Relations Act (the Wagner Act), on July 5, 1935); LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3269 (1935).

21. See ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920-1985, 40 (1986) ("The National Labor Relations (or Wagner) Act was one of the seminal enactments in American history"); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 151 (1963) ("The Wagner Act was one of the most drastic legislative innovations of the decade").

22. See LEUCHTENBURG, *supra* note 21, at 163 ("1935 marked the birth of a Second New Deal"); THE DEVELOPING LABOR LAW 25 (John E. Higgins, Jr. ed.) (5th ed. 2006) ("The Great Depression and the advent of President Franklin D. Roosevelt's New Deal spawned a political climate that was favorable—or at least tolerant of—the major federal legislation thought necessary at the time to promote the growth of organized labor.").

workers voted for union representation in NLRB-conducted elections.²³ And millions achieved a middle-class way of life through collective bargaining and agreements that provided fair wages and benefits in major industries of the economy.²⁴ This was the golden age of collective bargaining. For several decades, the labor law regime worked, and so it was respected. The law seemed to promise, and to some extent delivered, workplace democracy and equality in bargaining power.²⁵ The Act was remarkable for pioneering the administrative agency model,²⁶ and for its record of replacing sometimes-bloody labor conflict with the orderly procedures of the law.²⁷

The story of faded trust in the law unfolded gradually. By 1983, Harvard Law School Professor Paul Weiler lamented that “[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution.”²⁸ By then, organized labor was in steady decline.²⁹ In 1981, President Reagan fired striking air-traffic controllers, a watershed event.³⁰ The economy was changing dramatically.³¹ Foreign trade had begun to surge;³² technology was beginning to transform ways of communicating and doing business;³³ oil prices were climbing;³⁴ a major

23. By the mid-1950s, unions had come to represent around 35% of the private sector workforce. See ZIEGER, *supra* note 21, at 193.

24. See ZIEGER, *supra* note 21, at 137 (“The 1950s and 1960s were years of advance for working people and for the labor movement Organized labor . . . achieve[d] security and influence of unprecedented proportions. Union membership continued to grow Bold collective bargaining gains . . . decisively transformed workers’ life styles, both on the shop floor and in the larger society.”).

25. American family incomes grew by an average of 2.8% a year from 1947 through 1973, with every sector of society seeing its income roughly double. LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, *THE STATE OF WORKING AMERICA*, 2006/2007, 44-47 (2007).

26. See generally PETER IRONS, *THE NEW DEAL LAWYERS* 296 (1982) (calling the administrative process the “characteristic instrument of political and economic reform” of the twentieth century and the NLRB the “signal demonstration of the phenomenon”).

27. The NLRA appeared to provide a peaceable resolution to the labor conflicts that had afflicted American society for generations. “Trials of combat” were replaced by the “orderly procedures” of the law, and largely disappeared after its enactment. The enormous wave of strikes that followed World War II was accompanied by little violence, in contrast to those that occurred after World War I. The sharp decline in the level of industrial violence was considered another one of the achievements of the labor law. Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *THE HISTORY OF VIOLENCE IN AMERICA* 378-80 (1969).

28. Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

29. By 1984, union density in the private sector had declined to under 20%. Labor historian Robert Zieger called the labor movement of the mid-eighties “besieged and uncertain.” ZIEGER, *supra* note 21, at 193.

30. RICK FANTASIA & KIM VOSS, *HARD WORK* 66-67 (2004).

31. ZIEGER, *supra* note 21, at 194-95.

32. *Id.* at 194 (describing the rise in Japanese and Third World imports of core industrial products during the 1980s).

33. *Id.* at 195 (reporting the rise of “high-technology enterprise” in the 1980s).

34. Energy Information Administration Monthly Energy Review, *Petroleum Prices*, May 2007, available at http://www.eia.doe.gov/emeu/mer/pdf/pages/sec9_2.pdf (depicting the steep rise in crude oil prices during the early 1980s).

recession had hit the nation;³⁵ and real wages were stagnating.³⁶ In collective bargaining, concessions were frequently sought and two-tier wage structures became common.³⁷

What followed over the next two decades is familiar. The Cold War ended; technological innovation accelerated; relentless competition, both domestic and global, grabbed the economy; major industries were deregulated; manufacturing declined and the service sector exploded; shifting demographics changed the composition of the workforce; and a fourth wave of immigrants crossed our borders.³⁸ All of this flux has put severe strains on the collective-bargaining system created by the Act, and on labor and business, both struggling to adapt to and survive in a changing economy.³⁹

Through the late 1970s, management's priority in employment practice was to build a stable, loyal workforce.⁴⁰ The existing system of labor law was designed with a particular workplace model in mind. This workplace was characterized by a stable contract of hire between a single employer and employees engaged in work of a continuing nature at a fixed location, with hierarchical organization of work and promotion ladders.⁴¹ This model—exemplified by the manufacturing plants of the 1930s and 1940s—is increasingly anachronistic in a post-industrial and fiercely competitive global economy that has led firms to place a premium on flexibility instead

35. THOMAS A. KOCHAN, HARRY C. KATZ, & ROBERT B. MCKERSIE, TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 112-13 (1994).

36. *See id.* at 116-17 (describing the marked slowdown in pay growth throughout the early 1980s).

37. ZIEGER, *supra* note 21, at 194 (discussing the rise of “two-tier systems of compensation” and concession bargaining in the 1980s). *See also* KOCHAN et al., *supra* note 35, at 114-18, 132 (describing concessionary agreements and “two-tier pay system[s]” as phenomena arising in the difficult bargaining environment of the 1980s).

38. BRUCE NISSEN, UNIONS IN A GLOBALIZED ENVIRONMENT 4-7 (2002).

39. *See, e.g.*, Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 10 (1994) (suggesting a vast incompatibility exists between the “premises of our labor relations system and the pressures of competitive product markets”); *see generally* KOCHAN, *supra* note 35, at x-xx (describing the diverse array of external bargaining pressures faced by management and labor in recent years).

40. PETER CAPPELLI, CHANGE AT WORK 16-21 (1997) (describing the traditional employment arrangement of the 1970s as marked by stable training, development, internal promotion, and organizational policies).

41. *See* NISSEN, *supra* note 38, at 168 (“U.S. manufacturing unions [arose] during a particular period of capitalist evolution. This was a period when Fordism was the dominant production regime, when factories were large, and when workers were employed on the assembly line. The height of Fordism coincided with . . . a truce . . . whereby the U.S. government supported the rights of workers to be represented by unions and to engage in collective bargaining with their employers. In turn, business accepted labor unions as part of the institutional framework in which they operated . . .”).

of stability in employment patterns.⁴² The social contract that governed employment for decades has been broken.⁴³

The employer-employee relationship has changed in many industries, as has the nature of work itself. Work is increasingly contingent, with heavy reliance on outside contractors and staffing agencies.⁴⁴ There is continuous job-churning, as technology and skills become obsolete.⁴⁵ Restructurings, downsizings, and outsourcings of work abound, as do mergers and consolidations. Vertically-integrated corporations are dis-integrating, with ancillary functions being contracted out.⁴⁶

In this economic environment, unionized bargaining units and bargaining unit work regularly disappear.⁴⁷ Organizing workers is therefore a Sisyphean task for unions, and pushing for job security, wages and benefits means pushing uphill as well. With labor weakened, strikes have all but disappeared as an effective weapon in collective bargaining disputes.⁴⁸ Compounding the dilemma, business resistance to unionization, which is perceived as a handicap in competing against non-union rivals, is

42. See *id.* at 169-74 (describing the demise of the Fordist employment regime, and the “globalization and flexible production” employment model that has replaced it. The latter is marked by contracting out, offshore production, worker instability, and “flexibility taken to extremes.”).

43. *Id.* at 168 (“The accord has fallen apart.”).

44. CAPPELLI, *supra* note 40, at 4 (“[T]raditional methods of managing employees and developing skilled workers inside companies are breaking down. What we see in their place is a new employment relationship where pressures from product and labor markets are brought inside the organization and used to mediate the relationship between workers and management.”).

45. As Katherine Stone describes, technological change has spurred “a new constellation of job structures” in the twenty-first century labor market, upsetting long-held assumptions about stability and continuity in the employer-employee relationship. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 289 (2004). But technological change has also led to new jobs, as expanded access to advanced communication and computing equipment creates entrepreneurial opportunities for more and more people. Kevin Taglang, *Meeting Workforce Demands in the Digital Economy*, DIGITAL DIVIDE NETWORK, Dec. 4, 2000, available at www.digitaldivide.net/articles/view.php?ArticleID=279. While many new business ventures fail, others prosper, resulting in job churning across the country. *Id.* Indeed, as described by New York Times economics reporter Daniel Gross, today, the United States economy is a “giant job-churning machine,” where “each quarter destroys nearly 7 percent of existing jobs and creates a roughly equivalent percentage.” Daniel Gross, *Behind That Sense of Job Insecurity*, N.Y. TIMES, Sept. 10, 2006.

46. LYNN A. KAROLY & CONSTANTIJN W.A. PANIS, *THE 21ST CENTURY AT WORK* 117 (2004). See also Virginia Postrel, *Economic Sense: Vertical Integration Worked Well in Its Day; Now Companies Thrive by Turning to Specialists*, N.Y. TIMES, June 19, 2003 (“Since the 1980’s, American corporations have been disintegrating—not falling apart, but becoming more specialized. Revenues or production volumes may be as large as ever, but even big companies tend to combine fewer stages of production under the same corporate ownership.”).

47. CAPPELLI, *supra* note 40, at 63, 220.

48. In fact, scholars have suggested that workers have effectively lost the right to strike. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004). Indeed, while in 1946, there were nearly 6,000 strikes involving 4.6 million workers, today there are no more than 300 strikes a year. JEREMY BRECHER, *STRIKE!* 228 (1972); FEDERAL MEDIATION & CONCILIATION SERVICE, 2006 ANNUAL REPORT 7 (2006), available at http://fmcs.gov/assets/files/annual%20reports/FY2006_Annual_Report.pdf.

generally strong and often sophisticated.⁴⁹ Low union density is both a cause and a consequence of employer resistance.

III.

HOW THE BOARD HAS COMPOUNDED ITS CONSTRAINTS

In this historical context, American labor law, enacted when the prototypical workplace was the factory, and the rotary telephone was “the last word in desktop technology,”⁵⁰ increasingly appears out of sync with changing workplace realities.⁵¹ Yet the Board itself has made little sustained effort to adjust its legal doctrines to preserve worker protections in a ruthlessly competitive economy. In short, labor law policymakers and enforcers have done too little, too late.

To be sure, even a Board firmly committed to a dynamic application of the law would be limited in what it could do. A variety of factors and forces constrain the Board’s discretion, and to this extent, the Board’s arguable obsolescence was predictable, given big changes in the American economy and in American society that are beyond its control. But even allowing for its limited power, the Board itself has made things worse, not better, in recent years. After addressing the constraints on the Board, I highlight the Board’s recent missteps.

A. *What Constrains the Board*

Some of the constraints on the Board are inherent in the Act itself, beginning with the statutory text. These constraints also include the Board’s own accumulated precedent, a statutory prohibition against employing economists, the oversight of the federal courts, and other factors.

First, there is the statutory text. Written during the industrial era and in the context of a more stable economy,⁵² some provisions of the law seem antiquated. Even the statutory bargaining-unit model of collective bargaining may be misaligned with today’s economy.⁵³

The misalignment between law and reality is particularly well-illustrated by the provisions added to the Act by the 1947 Taft-Hartley Amendments⁵⁴ that define the Act’s coverage and exclusions. For example,

49. Estreicher, *supra* note 39, at 4 (disagreeing with general consensus among academic commentators that employer resistance to unionism is the “principal culprit behind the plummeting unionization rate”).

50. Michael J. McCarthy, *Sympathetic Ear: Your Manager's Policy On Employees' E-Mail May Have a Weak Spot—Labor Board Takes On Rules That Restrict Discussion Of Workplace Concerns—Vindicated, but 'Gun-Shy,'* WALL ST. J., Apr. 25, 2000, at A1.

51. *See supra* notes 44-46 and accompanying text.

52. *Id.*

53. *See supra* notes 44-49 and accompanying text.

54. 29 U.S.C. §§ 141-187 (2000).

the exclusion of “supervisors” is defined in terms⁵⁵ that are increasingly difficult to apply in settings (especially in non-industrial workplaces) where rank-and-file workers may have greater autonomy, where tiers of mid-level management have been eliminated, and where the lines between “worker” and “supervisor” are increasingly blurred. The Supreme Court’s decision in *NLRB v. Kentucky River Community Care, Inc.*, reversing the Board’s narrow reading of the supervisory exclusion as applied to nurses with certain authority over nursing assistants, illustrates the dilemma.⁵⁶ Writing for the majority, Justice Scalia acknowledged that the Board’s interpretation was based on a sound policy argument (maintaining the proper balance of power between labor and management by preserving statutory coverage for professionals).⁵⁷ The problem, he said, was that “the policy cannot be given effect through this statutory text.”⁵⁸

The 1947 exclusion of “independent contractors” from the definition of employees entitled to the Act’s protections similarly highlights the potential for conflict between sensible labor policy and statutory prescriptions.⁵⁹ The legislative history made clear that the Board must consider the common-law test for independent-contractor status. Congress specifically rejected the more dynamic approach—which focused on the economic realities of the relationship in light of the Act’s goals—that had just been endorsed by the Supreme Court in *NLRB v. Hearst Publications, Inc.*⁶⁰ As the *Hearst* Court predicted, adoption of the common law test—“import[ing] this mass of technicality” into the NLRA— “would be ultimately to defeat, in part at least, the achievement of the statute’s objectives” because “[m]yriad forms of service relationship with infinite and subtle variations in the terms of employment, blanket the nation’s economy.”⁶¹ That prediction seems remarkably prescient in today’s economic landscape, which reflects even

55. See 29 U.S.C. § 152(11) (“The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”).

56. 532 U.S. 706 (2001).

57. *Id.* at 719.

58. *Id.* at 720.

59. See 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include any individual having the status of an independent contractor.”). For an extended critique of NLRA independent contractor doctrine, see Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 1 (1999).

60. 322 U.S. 111 (1944). The Board’s approach, endorsed in *Hearst*, was sharply criticized by the House Committee report accompanying the 1947 amendments. H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947).

61. *Id.* at 125-127. In *Hearst*, the Supreme Court observed that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” 322 U.S. at 121.

greater diversity in employment arrangements than the *Hearst* Court observed in the 1940s.

Second, the Board's ability to innovate is constrained by well-established doctrines and more than seventy years of decisions (contained in 345 bound volumes, and counting).⁶² The Board acts at its peril if it side-steps precedent, fails to reconcile conflicts in the case law, or overrules precedent without explaining why it is doing so.⁶³ At the same time, rigidly adhering to precedent without explaining why is the antithesis of the reasoned decision-making required of administrative agencies.⁶⁴

Third, a little known provision of the Act prohibits the Board from employing economic analysts.⁶⁵ This provision was added by the 1947 Taft-Hartley Act because some members of Congress suspected the agency's economic researchers of being Communists.⁶⁶ It makes the Board ill-equipped to modernize labor law doctrines in response to a changing economy, let alone to make informed decisions based on economic realities. By design or happenstance, this handicap effectively promotes the Board's obsolescence. It is hard to imagine any other New Deal agency—such as the Securities and Exchange Commission or the Federal Communications Commission—operating without the ability to engage in economic research and analysis.

Fourth, there are the constraints imposed by the federal appellate courts, which review Board decisions, and by the Supreme Court. Even from the early days, the courts have sometimes limited the scope of the Act's protections.⁶⁷ Now, as union density has declined, jurists are increasingly unfamiliar with the notions of collective bargaining, solidarity, and unionization that inform the Act.⁶⁸ Combined with a growing insistence on strict statutory construction principles—such as the narrow

62. See, e.g., *Nott Co.*, 345 N.L.R.B. No. 23 (2005) (dissenting opinion, addressing employer's duty to maintain established bargaining relationship after various business transactions) ("Inevitably perhaps, over the course of nearly 70 years, the Board's decisions have sometimes collided with each other. Layer upon layer of doctrines interpreting the Act have evolved, with inconsistencies sometimes emerging and often unexplained.").

63. See, e.g., *Randell Warehouse of Arizona, Inc. v. N.L.R.B.*, 252 F.3d 445 (D.C. Cir. 2001); *ITT Industries, Inc. v. N.L.R.B.*, 251 F.3d 995 (D.C. Cir. 2001).

64. See, e.g., *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.*, 309 F.3d 578 (9th Cir. 2002); see also *supra* Part III.B.

65. See 29 U.S.C. § 154(a) ("Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of . . . economic analysis.").

66. JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD* 219-21 (1981).

67. See Pope, *supra* note 48, at 518; Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

68. Professor Brudney has studied the clash between the Board and the courts, particularly over the tension between the Act's policy to further collective bargaining and preserve its stability and the Taft Hartley-created right to refrain from collective action. Brudney, *A Famous Victory supra* note 4, at 943-47.

textualism suggested by Justice Scalia's statement in *Kentucky River*⁶⁹—the Board's ability to interpret the Act's often-broad language in light of policy considerations, as opposed to dictionary definitions, is considerably limited.

Finally, other inherent constraints on the Board's effective administration of the Act have been thoughtfully described by labor law scholars. These include, notably, the statute's weak remedies, which fail both to deter wrongdoing and to compensate victims of unlawful discrimination,⁷⁰ and the contentious process that, at least in the last twenty-five years, often accompanies the nomination and confirmation of Board Members, leading to frequent turnover, extended vacancies, repeated recess appointments, and a resulting delay in deciding cases.⁷¹

B. *How the Board Has Lost Its Way and Its Will*

Constrained or not, as an administrative agency responsible for enforcing Congressional policy, the Board does have discretion—indeed, it has a fundamental duty—to “adapt [its] rules and practices to the Nation's needs in a volatile, changing economy.”⁷² Surely, “the primary function and responsibility of the Board... is that of applying the general provisions of the Act to the complexities of industrial life.”⁷³ But today, the perceived obsolescence of the Board is linked in substantial part to its seeming lack of administrative will.

69. See 532 U.S. at 720 (noting “the policy cannot be given effect through this statutory text”).

70. Weiler, *supra* note 28, at 1787-96; Estlund, *supra* note 7, at 1537. For a contrasting view, see the Supreme Court's decision in *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that immigration laws preclude the Board from awarding backpay to undocumented workers who are unlawfully discharged for union activities). Writing for the Court's 5-4 majority, Chief Justice Rehnquist explained:

Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair labor practices.... We have deemed such ‘traditional remedies’ sufficient to effectuate national labor policy regardless of whether the ‘spur and catalyst’ of backpay accompanies them.

Id. at 152 (citations omitted).

71. Delays in the legal process also make the system ineffective and deny justice. These delays are not new—the Seventh Circuit famously referred to the NLRB as the “Rip Van Winkle of administrative agencies” some years ago in *NLRB v. Thill*, 980 F.2d 1137, 1142 (7th Cir.1992)—but they became more pronounced after the 1980s, as the appointment process for Board Members became more politicized, thereby resulting in more vacancies, more turnover, and more delays. See Brudney, *Isolated*, *supra* note 11, at 243-52; John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. L.1 (2000).

72. *American Trucking Assns. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967).

73. *Ford Motor Co. v. NLRB*, 441 U.S. 448, 496 (1979), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); and *NLRB v. Steelworkers*, 357 U.S. 357, 362-363 (1958).

The Board is not only failing to maximize its available discretion, but its recent decisions are marginalizing statutory rights. While any one decision standing alone may not be cataclysmic in impact, viewed together, they represent a pattern of weakening the protections of the Act.⁷⁴ Where decisional choices are available to the Board, the choice too often selected narrows statutory coverage or protection. Fewer workers have been afforded fewer rights; employee rights are subordinated to countervailing business interests; meaningful remedies are denied; and recent decisions that tried to update the law have been overruled. Increasingly, the Board has adopted a formalistic approach to interpreting the law, turning away from the real world and the challenges it poses for labor policy.⁷⁵ This approach threatens to result in a loss of confidence in the Board's decisionmaking, not simply in terms of the results reached, but also in the way those results are reached.

To begin, the 2001-present Bush Board (in its various incarnations) has almost reflexively overruled many of the key decisions issued by the prior Clinton Board, which had endeavored to update the law by affording greater protections to workers in an evolving economy. For example, modest efforts were made to give more workers coverage under the Act's protections,⁷⁶ to enhance the ability of contingent workers to engage in collective bargaining,⁷⁷ to preserve representational rights after a corporate merger or consolidation,⁷⁸ and to provide non-union workers (more than 90 percent of today's private sector workforce) with an important protection against unfair discipline.⁷⁹

At the time, those decisions triggered widely divergent criticism. A former Board Chairman described the Clinton Board as engaging in "an orgy of overruling existing precedents,"⁸⁰ and a management practitioner

74. University of Michigan Law School Professor of Law Emeritus Theodore J. St. Antoine made these observations in remarks to the Headquarters staff of the NLRB on the occasion of the Board's seventieth anniversary. Theodore J. St. Antoine, *After 70 Years of the NLRB: Warm Congratulations—and a Few Reservations*, LAW QUADRANGLE NOTES, Fall 2005, at 98, 101.

75. See, e.g., Bath Iron Works Corp., 345 N.L.R.B. No. 33 (2005); Boghosian Raisin Packing Co., 342 N.L.R.B. 333 (2004); Alexandria Clinic, 339 N.L.R.B. 1262 (2003). For an illustration of the debate between current Board Members on this subject, see BNA DAILY LABOR REPORT, *Two Current Board Members Describe Differing Approaches to Decisionmaking*, May 27, 2005, at A-10; BNA DAILY LABOR REPORT, *Members Schaumber, Liebman Discuss Differing Views on Recent Board Decisions*, Mar. 3, 2005.

76. New York Univ. Medical Ctr, 332 N.L.R.B. 1205 (2000), *overruled by* Brown Univ., 342 N.L.R.B. 483 (2004).

77. Sturgis, 331 N.L.R.B. 1298 (2000), *overruled by* Oakwood Care Ctr, 343 N.L.R.B. 659 (2004).

78. St. Elizabeth Manor, 329 N.L.R.B. 321 (1999), *overruled by* MV Transp., 337 N.L.R.B. 770 (2002).

79. Epilepsy Found., 331 N.L.R.B. 676 (2000), *overruled by* IBM Corp. 341 N.L.R.B. No. 148 (2004).

80. Edward B. Miller, *NLRB Forum: Strikes, Lockouts and Boycotts*, 51 LAB. L. J. 89, 94 (2000).

said its decisions were “ripe for judicial reversal.”⁸¹ In contrast, two union practitioners observed that the decisions revealed the “increasingly confined (indeed relatively insignificant) doctrinal terrain on which the conflict over U.S. labor policy is enacted.”⁸² As it turned out, each of those decisions—and others—was short-lived.⁸³

In turn, the present Board majority has undermined long-established doctrines that promote collective bargaining by allowing employers and unions to enter into voluntary recognition arrangements.⁸⁴ The Board has demonstrated a corresponding reluctance to revisit doctrines that hinder collective bargaining by allowing employers to unilaterally terminate collective bargaining relationships,⁸⁵ making it more difficult to bring the “necessary party” into the collective bargaining process,⁸⁶ facilitating employer pressure on employees to reject unionization,⁸⁷ placing artificial barriers in front of voluntary recognition of unions by employers,⁸⁸ and

81. Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 80 (2000).

82. Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103 (2000).

83. For other decisions reversing Clinton Board precedent, *see, e.g.*, Jones Plastic & Engineering Co., 351 N.L.R.B. No. 11 (2007) (addressing significance of at-will employment relationship to status as permanent striker replacement), *overruling* Target Rock Corp., 324 N.L.R.B. 373 (1997); TruServ Corp., 349 N.L.R.B. No. 23 (2007) (permitting decertification petition to be processed after post-petition settlement of unfair labor practice charges against employer), *overruling* Douglas-Randall, Inc., 320 N.L.R.B. 431 (1995); Crown Bolt, Inc., 343 N.L.R.B. 776 (2004) (rejecting presumption that employer’s plant-closure threat was widely disseminated), *overruling* Springs Industries, 332 N.L.R.B. 40 (2000); Saint Gobain Abrasives, Inc., 342 N.L.R.B. 434 (2004) (requiring Regional Director to conduct hearing before dismissing decertification petition filed after alleged unfair labor practices by employer), *rev’g* Priority One Services, 331 N.L.R.B. 1527 (2000). Additional reversals of precedent are discussed *infra* notes 102, 127-128.

84. *See, e.g.*, Dana Corp., 351 N.L.R.B. No. 28 (2007) (establishing window period for filing decertification petition, following employer’s voluntary recognition of union); Shaw’s Supermarkets, 343 N.L.R.B. 963 (2004) (granting review to consider whether employer waived right to Board election, and whether to permit such waiver with respect to after-acquired stores where union demonstrates majority support). *See also* Supervalu, Inc., 351 N.L.R.B. No. 41 (2007) (holding that contract provision requiring employer to recognize union at newly-organized stores was not mandatory subject of bargaining, absent proof that stores would be included in existing bargaining unit); Marriott Hartford, 347 N.L.R.B. No. 87 (2006) (granting review to consider whether union had demanded voluntary recognition, permitting employer to file election petition with Board, where union sought agreement for card-check recognition).

85. Nott Co., 345 N.L.R.B. No. 23 (2005) (permitting employer to withdraw recognition from union and repudiate collective-bargaining agreement, following employer’s acquisition of non-union business and consolidation of union and non-union workforces of equal size).

86. Airborne Freight Co., 338 N.L.R.B. 597 (2002) (declining to revisit current standard for determining joint-employer status, which requires direct and immediate control over matters relating to employment relationship).

87. Frito-Lay, 341 N.L.R.B. 515 (2004) (following precedent that permits employer “ride-alongs” in which employer officials accompany truck drivers for up to 12 hours in order to campaign against union).

88. Elmhurst Care Ctr., 345 N.L.R.B. No. 98 (2005) (continuing to prohibit employer from voluntarily recognizing union where employer has hired core group of employees, but is not yet engaged in normal business operations).

permitting employers to retaliate against employees for engaging in statutorily-protected conduct.⁸⁹

Perhaps the best illustration of the Board's current decisionmaking is its 2006 decision in *Oakwood Healthcare, Inc.*,⁹⁰ interpreting key terms in the Act's definition of a "supervisor." This decision came in the wake of the Supreme Court's decision in *Kentucky River*,⁹¹ which had rejected the Clinton Board's attempt at a limiting interpretation with respect to professionals. In *Oakwood*, the Board majority—relying on dictionary definitions of ambiguous statutory terms, without explaining the choice among definitions—selected a more-expansive-than-necessary reading of the supervisory exclusion. The majority expressed its indifference to the impact of its decision, rejecting what it called the dissenters' "results-driven approach" in looking to the potential real-world consequences of the majority's interpretation.⁹²

The Board thus issued a decision that potentially swept many professional employees outside of the Act's protection, while failing to engage in the sort of reasoned decisionmaking that Congress expected from the Board. When dictionary definitions matter more than economic or workplace realities, the Board abdicates its intended role as an expert administrative agency charged with making labor law and policy tailored to the complexities of a changing economy.

Unfortunately, *Oakwood* reflects a trend to limit the coverage of the Act itself.⁹³ When non-traditional (or non-traditionally employed) workers have sought to organize themselves into a union, the Board majority has denied them statutory "employee" status: graduate teaching assistants,⁹⁴ disabled workers,⁹⁵ artists' models,⁹⁶ and newspaper carriers.⁹⁷ The Board has also limited the ability of contingent employees—workers supplied by one employer to another—to engage in collective bargaining.⁹⁸

89. Reynolds Electric, Inc., 342 N.L.R.B. 156 (2004) (continuing to apply rule that discharge of employee for engaging in concerted protected activity is lawful, absent showing that employer was aware of concerted nature of activity).

90. 348 N.L.R.B. No. 37 (2006).

91. 532 U.S. at 706.

92. 348 N.L.R.B. No. 37, slip op. at 3.

93. There are two notable exceptions to this trend: the decision to extend the Act's coverage to casinos on tribal reservations, San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1288 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and the decision rejecting the creation of a novel national-security exemption for private airport security screeners, Firstline Transp Security, Inc., 347 N.L.R.B. No. 40 (2006).

94. Brown Univ., 342 N.L.R.B. 483 (2004) (holding that educational relationship is not employment).

95. Brevard Achievement Ctr., 342 N.L.R.B. 982 (2004) (holding that rehabilitative relationship was not employment).

96. Pa. Acad., 343 N.L.R.B. 846 (2004) (holding that models were independent contractors).

97. St. Joseph News-Press, 345 N.L.R.B. No. 341 (2005) (holding that carriers were independent contractors).

98. Oakwood Care Ctr., 343 N.L.R.B. 659 (2004).

In these cases, the majority justified its decisions on dubious policy grounds, giving little weight to the plain language of the Act (which is perhaps surprising, given the majority's adherence to a narrow textualism in *Oakwood*).⁹⁹ The Board largely ignored the economic realities of the employment relationships in question, and declined to exercise its discretion to afford a broader group of workers a right to collective representation. As Member Walsh and I observed in one dissent, if the majority were correct about the statute, then the "National Labor Relations Act itself could not guarantee an important, and growing, segment of American workers the right to collective bargaining. The problem here, however, is not the statute, but the agency that administers it."¹⁰⁰

What is the result? Fewer workers have fewer rights under the Act. In several recent decisions, the Board majority has chosen a very confined view of "concerted" activity for the purpose of "mutual aid or protection," as protected by section 7 of the Act.¹⁰¹ All private sector workers covered by the Act, union-represented or not, have the right to engage in these activities. Yet, in *IBM Corp.*,¹⁰² the Board held that, unlike unionized workers, employees in the non-union sector have no right to a witness at an investigatory interview that might lead to discipline. *IBM* reversed the recent *Epilepsy Foundation*¹⁰³ decision, which was significant not just for its specific holding, but also for its reminder that the statute's protections apply to unrepresented workers, whether they know it or not.¹⁰⁴ As one commentator observed, before *Epilepsy Foundation*, "the scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law."¹⁰⁵ With *IBM*, the Board signaled that

99. 348 N.L.R.B. No. 37.

100. *Oakwood Care Ctr.*, 343 N.L.R.B. at 670.

101. See, e.g., *Waters of Orchard Park*, 341 N.L.R.B. No. 93 (2004) (two nurses who phoned a state hotline to report excessively hot conditions in a nursing home were not engaged in protected activity because their call was made in the interest of patient care, not their own terms and conditions of employment); *Holling Press*, 343 N.L.R.B. 301 (2004) (one female worker who sought the assistance of another in her sexual harassment charge against a male supervisor was looking out only for herself and not engaged in activity for mutual aid or protection).

102. 341 N.L.R.B. 1288 (2004).

103. 331 N.L.R.B. 676 (2000), *enf'd. in relevant part*, 268 F.2d 1095 (D.C. Cir. 2001).

104. The majority justified its action by citing changes in the workplace, and, among other things, "the events of September 11, 2001, and their aftermath." 341 NLRB at 1291. In response, the New York City Bar Association issued a highly-critical position paper, which observed that "[t]o rely on such events in determining the rights of employees under the National Labor Relations Act distorts the legitimate decision making process and injects political considerations into a matter of statutory construction." See New York City Bar Association, Media Advisory, *The New York City Bar Association Opposes NLRB Decision To Rely on the Terrorism Threat as a Reason to Deny Non-Union Employees The Right to Have A Representative Present During Disciplinary Interviews* (Oct. 20, 2004), available at http://www.abcny.org/PressRoom/PressRelease/2004_10_20.htm.

105. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002) (internal citation omitted). See also William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23 (2006).

it was not prepared to treat non-union workers as fully within the Act's protection. Because so few private sector employees are unionized, statutory protections for non-union workers have never been more important. Such workers do, in fact, spontaneously act together to seek better working conditions,¹⁰⁶ and the Act might well matter to them. The *IBM* decision is thus a powerful omen of the statute's growing irrelevance.

The Board majority regularly has found that employee statutory rights must yield to countervailing business interests. These interests are far-ranging. They include private property rights (including an employer's property interest in a piece of scrap paper used to post a union-meeting notice),¹⁰⁷ various managerial prerogatives,¹⁰⁸ business justifications,¹⁰⁹ notions of workplace decorum and civility,¹¹⁰ and employer free speech rights.¹¹¹ In cases involving unionized workers, the decisions signify a *laissez-faire* approach to bargaining, giving employers free rein to operate without meaningful bargaining.¹¹² Where non-unionized workers were

106. See, e.g., Phoenix Processor, 348 N.L.R.B. No. 4 (2006) (unrepresented workers on fish-processing ship engaged in walk-out to protest 16 ½-hour day; discharge upheld relying on anti-mutiny statute); Quietflex Mfg. Co., 344 N.L.R.B. No. 130 (2005) (unrepresented workers engaged in 12-hour protest in employer's parking lot, but did not interfere with access or operations; discharge upheld).

107. Johnson Tech., Inc., 345 N.L.R.B. No. 47 (2005) (finding lawful employer's warning to employee who used scrap paper to replace union-meeting notice that probably had been removed by management official).

108. Deference to such prerogatives is illustrated by a series of decisions upholding the refusal of employers to provide unions with requested information. See, e.g., Raley's Supermarkets, 349 N.L.R.B. No. 7 (2007) (dismissing allegation that employer unlawfully refused to provide union with requested information related to grievance involving employer investigation of alleged supervisory harassment); Northern Indiana Public Serv. Co., 347 N.L.R.B. No. 17 (dismissing allegation that employer unlawfully refused to provide union with investigatory interview notes involving alleged threat of violence by supervisor); Borgess Med. Ctr., 342 N.L.R.B. 1105 (2004) (refusing to order employer's disclosure of hospital incident reports, despite finding that refusal to provide reports to union was unlawful).

109. See, e.g., Bunting Bearings Corp., 343 N.L.R.B. 479 (2004) (finding business justification for partial lockout limited to union members in bargaining unit), *petition for review granted*, 179 Fed. App'x. 61 (D.C. Cir. 2006); Midwest Generation, EME, LLC, 343 N.L.R.B. 12 (2004) (finding business justification for partial lockout based on extent of employees' participation in strike), *petition for review granted*, 429 F.3d 651 (7th Cir. 2005).

110. See, e.g., American Steel Erectors, Inc., 339 N.L.R.B. 1315 (2003) (finding that employer lawfully refused to hire former union employee who had criticized employer's job-safety record before state agency); PPG Industries, Inc., 337 N.L.R.B. 1247 (2002) (finding that employer lawfully disciplined employee who used vulgarity in characterizing employer's conduct toward co-worker being solicited to sign union card). See also Fineberg Packing Co., 349 N.L.R.B. No. 29 (2007) (finding that employer did not condone unlawful walkout by employees, despite manager's statement to employees that he was not firing anyone and that employees should "come back tomorrow").

111. See, e.g., Aladdin Gaming, LLC, 345 N.L.R.B. No. 41 (2005) (finding lawful a management official's interruption of off-duty employees' conversation about signing union authorization cards); Werthan Packaging, Inc., 345 N.L.R.B. No. 30 (2005) (finding no objectionable election conduct where manager interrogated employee and stated that voting for union was not in best interests of employee and her family).

112. See, e.g., Garden Ridge Mgmt., Inc., 347 N.L.R.B. No. 13 (2006) (dismissing allegation of surface-bargaining by employer and permitting withdrawal of union recognition), *on motion for reconsideration*, 349 N.L.R.B. No. 103 (2007) (denying General Counsel's motion for reconsideration); Richmond Times-Dispatch, 345 NLRB No. 11 (2005) (finding that employer did not claim inability to

involved, these cases signal that their right to join together to improve working conditions is largely illusory. In several cases, intimidating employer statements made during an organizing campaign were found to be lawful expressions of employer free speech.¹¹³ But where employees make statements or engage in conduct seen as exceeding rules of civility, decorum, or loyalty, the employees have been held to have lost the protection of the Act.¹¹⁴ These decisions suggest an underlying discomfort with government regulation of business, the notion of collective action, and the zeal that may accompany those efforts: the fundamental premises of this statute.

Although truly meaningful and effective remedies for unfair labor practices are limited under the Act,¹¹⁵ the Board nonetheless has refused to exercise the full remedial discretion it does have. For example, the Board has been reluctant to pierce the corporate veil to impose liability for unfair labor practices.¹¹⁶ The regular refusal to issue *Gissel* bargaining orders (which require an employer to recognize a union with majority support, where the employer's unfair labor practices have frustrated the election

pay bonus and so lawfully refused to provide financial information to union, following employer's claim that it was "unable to pay" annual bonus and had "no choice" but to cancel bonus); *Sea Mar Cmty. Health Ctrs.*, 345 N.L.R.B. No. 69 (2005) (finding no violation in employer's refusal to bargain over closure of operation that was established by official without approval by upper management).

113. *See, e.g.*, *Medieval Knights, LLC*, 350 N.L.R.B. No. 17 (2007) (finding that consultant's statement that hypothetical employer could lawfully "stall out" contract negotiations was not threat that electing union would be futile); *TNT Logistics No. Am., Inc.*, 345 N.L.R.B. No. 21 (2005) (finding that supervisor's unsupported statement that employer would lose only customer if employees unionized was lawful expression of personal opinion); *Manhattan Crowne Plaza Town Park Hotel Corp.*, 341 N.L.R.B. 619 (2004) (finding that employer's statement recounting mass discharge of recently-unionized employees at another employer's hotels was not threat of reprisal); *Curwood, Inc.*, 339 N.L.R.B. 1137 (2003) (finding that employer's letter stating that customers viewed unionization negatively was lawful).

114. *See, e.g.*, *Five Star Transportation, Inc.*, 349 N.L.R.B. No. 8 (2007) (upholding employer's refusal to hire school bus drivers, employed by prior contractor, who had criticized employer in letters to school board). *See generally* Matthew Finkin, *Disloyalty! Does Jefferson-Standard Stalk Still?*, 28 *BERKELEY J. EMP. & LAB. L.* 541 (2007), available at <http://ssrn.com/abstract=976725>.

115. *See supra* note 70.

116. *See, e.g.*, *Flat Dog Productions, Inc.*, 347 N.L.R.B. No. 104 (2006). In one recent glaring example, the Board majority refused to pierce the corporate veil to hold corporate co-owners personally liable for backpay obligations to employees who suffered financial consequences of flagrant unfair labor practices. By the time of the backpay proceedings, the co-owners had distributed all of the company's funds to themselves. The Board majority held, however, that because the distributions occurred before the unfair labor practice charges were filed, the distributions did not constitute an evasion of the company's legal obligations. *A.J. Mechanical, Inc.*, 345 N.L.R.B. No. 22 (2005). The United States Court of Appeals for the District of Columbia Circuit disagreed, stating bluntly:

Surely, it is reasonable to infer that a thief who robs a bank in broad daylight knows well before the date of his indictment that he may one day face criminal liability. The corporate conduct at issue here is the labor-law equivalent of a daylight robbery. It was neither subtle nor close to the line of legality.

Carpenters and Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804 (D.C. Cir. 2007). *See also* *US Reinforcing, Inc.*, 350 N.L.R.B. No. 41 (2007) (refusing to find that two companies were alter egos, where principals co-habited but were not married).

process) is another such example.¹¹⁷ So too is the continuing rejection of the “minority” bargaining order, where an employer’s egregiously unlawful conduct has prevented a union from establishing majority support.¹¹⁸ The Board has also shown no interest in adopting new modest monetary remedies for victims of discrimination.¹¹⁹ Indeed, the Board’s rulings have created new obstacles to backpay awards.¹²⁰ Decisions about other minor remedial innovations, such as the electronic posting of required notices to employees, have been deferred for no compelling reason.¹²¹

Some of the Board’s recent decisions have failed to survive judicial scrutiny.¹²² Other decisions have navigated the layers of precedent by ignoring precedent entirely or by distinguishing earlier cases on abstract, questionable grounds.¹²³ And too many decisions have cast doubt on

117. *See, e.g.*, *Hialeah Hospital*, 343 N.L.R.B. 391 (2004).

118. *First Legal Support Services*, 342 N.L.R.B. 350 (2004).

119. *Hotel Employees, Local 26*, 344 N.L.R.B. No. 70 (2005) (declining to order “tax compensation” remedy for victim of discrimination who incurs heightened tax burden as result of receiving lump sum backpay award).

120. *St. George Warehouse*, 351 N.L.R.B. No. 42 (2007) (reversing precedent and placing burden on General Counsel to produce evidence concerning discriminatee’s job search, when employer demonstrates availability of jobs); *Anheuser-Busch, Inc.*, 351 N.L.R.B. No. 40 (2007) (reversing precedent and holding that employees discharged based on information from unlawfully-installed security cameras are not entitled to remedy). *See also Grosvenor Resort*, 350 N.L.R.B. No. 86 (2007) (denying backpay to discriminatees for not seeking work quickly enough and for not seeking interim employment while waiting for previously secured interim employment to commence); *Aluminum Casting & Engineering Co.*, 349 N.L.R.B. No. 18 (2007) (denying employees full backpay for unlawfully withheld wage increase); *Georgia Power Co.*, 341 N.L.R.B. 576 (2004) (denying employee unlawfully withheld promotion because General Counsel failed to prove that employee “certainly” would have been promoted).

121. *Nordstrom, Inc.*, 347 N.L.R.B. No. 28 (2006).

122. *See Jochims v. NLRB*, 480 F.3d 1161, 1164 (D.C. Cir. 2007) (reversing Board’s finding of supervisory status, observing that “the Board completely deviated from its own precedent and issued a judgment that is devoid of substantial evidence”); *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007) (reversing Board’s finding that employer’s anti-fraternization rule was lawful); *United Steel Workers v. NLRB*, 179 Fed. Appx. 61 (D.C. Cir. 2006) (remanding, as inconsistent with precedent, Board’s finding that partial lockout was non-discriminatory, and observing that it was “not appropriate” for Board to “speculate” as to employer’s motive for lockout, given employer’s burden of proof); *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 193 (1st Cir. 2006) (reversing Board’s “arbitrary and capricious” determination that employer lawfully refused to reinstate economic strikers, based on secret hiring of permanent replacements); *International Chemical Workers Union Council v. NLRB*, 447 F.3d 1153 (9th Cir. 2006) (reversing, based on lack of substantial evidence, Board’s determination that employer did not plead inability to pay and thus lawfully refused to provide financial information to union during bargaining); *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005) (reversing Board’s determination that employer lawfully discharged union steward for purportedly harassing anti-union employee); *Local 15, Int’l Bhd. of Electrical Workers v. NLRB*, 429 F.3d 651 (7th Cir. 2005) (reversing Board’s determination that partial lockout was non-discriminatory and remanding with instructions to find lockout unlawful); *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005) (reversing, based on conflict with precedent, Board’s refusal to grant make-whole remedy to employees disciplined as result of employer’s unlawful installation of surveillance cameras).

123. *See, e.g.*, *Bath Iron Works*, 345 N.L.R.B. No. 33 (2005), *enf’d.*, 475 F.3d 14 (1st Cir. 2006) (dissenting opinion) (implicating “competing analytical approaches where an employer claims the right to act unilaterally with respect to a mandatory subject of bargaining, based on language in a collective-bargaining agreement”).

precedent unnecessarily, or have applied it reluctantly, suggesting that the law may soon change, and sowing confusion.¹²⁴ This kind of decisionmaking is of little use to parties struggling to make sense of their statutory rights and duties. While it may dispose of particular cases, it is ultimately unhelpful in shaping a coherent national labor policy.

Meanwhile, the Board's approach to exercising and preserving its own authority is contradictory. It has jealously guarded its representation-case functions (discouraging union attempts to organize outside the Board's procedures),¹²⁵ while eagerly deferring to dubious arbitration decisions in unfair labor practice cases (sometimes frustrating the vindication of statutory rights).¹²⁶

Perhaps this contradiction can be explained by the Board's orientation toward protecting employee free choice in the narrow sense: taking special care to ensure that employees are free to refrain from union activity and to reject union representation, while showing less concern about the rights of employees to engage in concerted activity, to choose (and keep) a union, and to be free from anti-union discrimination. Several Board decisions have made it more difficult for unions to organize workers.¹²⁷ In particular, the Board has rolled back protections for "salts," union members who seek employment to engage in organizing activity.¹²⁸ Other decisions have shown a disappointing reluctance to confront what clearly seemed to be whole-scale employer discrimination in hiring.¹²⁹ Tellingly, the Board has stated expressly, for the first time, that the exercise of employee free choice is superior in the statutory scheme to the stability of collective

124. See, e.g., American Red Cross Missouri-Illinois Blood Services Region, 347 N.L.R.B. No. 33 n. 21 (2006); Construction Products, Inc., 346 N.L.R.B. No. 60 n. 1 (2006); Siemens Building Tech., 345 N.L.R.B. No. 91 n. 5 (2005); Vanguard Fire & Supply Co., Inc., 345 N.L.R.B. No. 77 n. 9 (2005); Daimler-Chrysler Corp., 344 N.L.R.B. No. 154 fn. 1 (2005); Contract Flooring Systems, Inc., 344 N.L.R.B. No. 117 at 1 (2005); Meijer, Inc., 344 N.L.R.B. No. 115 n. 7 (2005).

125. See, e.g., Boeing Co., 349 N.L.R.B. No. 91 (2007); Advanced Architectural Metals, Inc., 347 N.L.R.B. No. 111 (2006); United States Postal Serv., 383 N.L.R.B. No. 3 (2006).

126. See, e.g., Kvaerner Phila. Shipyard, Inc., 347 N.L.R.B. No. 36 (2006); Smurfit-Stone Container Corp., 344 N.L.R.B. No. 82 (2005); Aramark Services, Inc., 344 N.L.R.B. No. 68 (2005).

127. Teamsters Local 75 (Schreiber Foods), 349 N.L.R.B. No. 14 (2007) (finding that union unlawfully charged objecting non-members for organizing expenses, where union failed to prove that organizing within same industry leads to increased union wage rates); Randell Warehouse, Inc., 347 N.L.R.B. No. 56 (2006) (reversing Clinton Board precedent and finding that union's videotaping of campaign-literature distribution was objectionable); Harborside Healthcare, Inc., 343 N.L.R.B. 906 (2004) (reversing precedent and liberalizing standard for finding pro-union supervisory conduct objectionable in context of representation elections). See also Correctional Medical Services, Inc., 349 N.L.R.B. No. 111 (2007) (upholding discharge of unrepresented employees who picketed health-care employer, based on union's failure to provide statutorily-required advance notice).

128. See Toering Electric Co., 351 N.L.R.B. No. 18 (2007) (requiring General Counsel to prove that salt is genuinely interested in employment with employer, to establish violation in hiring-discrimination case); Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. No. 118 (2007) (reversing judicially-approved precedent and requiring General Counsel to establish duration of remedial period for salts).

129. Zurn/N.E.P.C.O., 345 N.L.R.B. No. 1 (2005), *petition for rev. denied*, Northern Michigan Bldg. & Const. Trades Council v. N.L.R.B., 2007 WL 1805667 (6th Cir. June 20, 2007).

bargaining.¹³⁰ This elevation of one of two competing ideals in the Act undoes the delicate balance long established in Board doctrine, and seems to signal a devaluing of what is unique about this statute—the protection of collective rights. Given this orientation, it is unfortunate, but not surprising, that some critics question whether the Board still believes in its mission.

IV. WHAT COMES NOW?

Twenty years ago, one scholar described the New Deal as the major incubation period for federal legislation, and predicted that “mouldering statutes and elderly agencies” would plague our legal system in years to come.¹³¹ Some scholars have argued that the National Labor Relations Act was doomed from the start.¹³² Nonetheless, and despite imposing evidence, both empirical and anecdotal, of labor law’s decline, there remains, at least among some practitioners, a stubborn attachment to this law and its lofty ambition of economic justice.¹³³

The good news from the past year is that labor law issues have once again entered the public domain. In the summer of 2006, extensive news coverage¹³⁴ surrounded the then-expected issuance of the *Oakwood* decision on supervisory status, especially as applied to nurses.¹³⁵ Indeed, on July 18, 2006, the Comedy Central cable television network program *Colbert Report*

130. Nott Co., 345 N.L.R.B. No. 23 (2005) (“[A]lthough industrial stability is an important policy goal, it can be trumped by the statutory policy of employee free choice. That policy is expressly in the Act, and indeed lies at the heart of the Act.”). For illustration of the consequences of this orientation, see Dana Corp, *supra*; Shaw’s Supermarkets, Inc., 350 NLRB No. 55 (2007)(permitting employer to withdraw recognition from union after third year of five-year agreement, even though petition for election could not be filed); Wurtland Nursing & Rehabilitation Center, 351 N.L.R.B. No. 50 (2007) (permitting employer to withdraw recognition from union based on employee petition seeking “a vote to remove the Union”); Badlands Golf Course, 350 N.L.R.B. No. 28 (2007) (permitting employer to withdraw recognition from union less than three weeks after minimum six-month period of insulated bargaining, following earlier unlawful withdrawal of recognition).

131. Brudney, *supra* note 4, at 941 (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 96 (1977)).

132. Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, U. OF PENN. INST. FOR LAW & ECON RESEARCH PAPER NO. 06-17 (forthcoming), available at <http://ssrn.com/abstract=920458>.

133. See *supra* note 74 and accompanying text.

134. See, e.g., Barbara Rose, *Board Decision Could Bar More From Unions*, CHI. TRIB., Oct. 4, 2006, at B9; Jane M. Von Bergen, *Testing Unions’ Clout; Pivotal cases: For Some Employees, Their Union Status Hinges on an NLRB Decision that Will Define the Word “Supervisor”*, PHILADELPHIA INQUIRER, Aug. 10, 2006, at C1; Steven Greenhouse, *Labor Board Decision Broadens Definition of Supervisors*, N.Y. TIMES, Oct. 4, 2006, at A16.

135. *Oakwood* and its companion decisions were released on October 3, 2006. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (2006); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. No. 39 (2006). See NLRB Press Release R-2603, *NLRB Issues Lead Case Addressing Supervisory Status in Response to Supreme Court’s Decision in Kentucky River* (Oct. 3, 2006), available at www.nlr.gov.

even included a segment on the issue.¹³⁶ And there has been wide coverage¹³⁷ of the Employee Free Choice Act,¹³⁸ approved by the House of Representatives on March 1, 2007, but filibustered in the Senate.¹³⁹ With this publicity, Americans are being educated about the erosion of the right to organize and the danger posed to our society as a consequence, especially in the context of growing income inequality.

Labor law policy has been marginalized for too long, and public dialogue on these issues has too long been absent. Public consideration of labor policy, in which the Board plays a positive role, is sorely needed if we are to protect the rights of workers to organize and bargain collectively in a competitive global economy. How do we achieve a proper balance between market freedom and democratic values? How do we preserve a middle-class society? Today, the story of faded trust in American labor law lies in the gap between early hopes and later results. Like dinosaur DNA, however, the promise of the Act is worth preserving. The stakes are too high to do otherwise.

136. *The Colbert Report: Solidarity* (Comedy Central television broadcast Jul. 18, 2006), available at http://www.comedycentral.com/shows/the_colbert_report/index.jhtml.

137. See, e.g., *Increasingly Labor's Day in Congress*, L.A. TIMES, Mar. 2, 2007; Steven Greenhouse, *House Passes Top Priority of Unions*, N.Y. TIMES, Mar. 2, 2007, at A14; Edward Epstein, *House Passes Pro-Labor Bill to Help Workers Form Unions*, S.F. CHRON., Mar. 2, 2007, at A4.

138. Employee Free Choice Act, H.R. 800, 110th Cong. (2007).

139. See *Supporters of Card Check Fall Short of Votes Needed to Limit Senate Debate*, DAILY LABOR REPORT (BNA), June 27, 2007, at AA-2.

